

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-4922

March 22, 2018

R E S O L U T I O N

Resolution E-4922. Commission order to continue the Bioenergy Market Adjusting Tariff (BioMAT) program and to execute certain bioenergy contracts.

PROPOSED OUTCOME:

- Continuation of BioMAT programs, and execution of BioMAT contracts, under current program rules pending further Commission action.

SAFETY CONSIDERATIONS:

- Commission approved standard contracts contain Commission approved safety provisions, which require the Seller to provide an independent report certifying a written plan for the safe construction and operation of the Facility.

ESTIMATED COST:

- The estimated annual cost of the BioMAT contracts ordered by this Resolution is \$23 million. Total potential BioMAT program costs are between \$232 million per year and \$344 million per year.

By Energy Division's own motion.

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SUMMARY

This Resolution orders Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively IOUs) to continue their BioMAT programs under current program rules.

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This Resolution also orders PG&E, SCE, and SDG&E to execute contracts with eligible Sellers that have accepted and may in the future accept prices offered as part of the BioMAT program.

## **BACKGROUND**

### **Overview of the Renewables Portfolio Standard (RPS) Program**

The California RPS program was established by Senate Bill (SB) 1078, and has been subsequently modified by SB 107, SB 1036, SB 2 (1X), and SB 350.<sup>1</sup> The RPS program is codified in Public Utilities Code Sections 399.11-399.32.<sup>2</sup>

Under SB 2 (1X), the RPS program administered by the Commission requires each retail seller to procure eligible renewable energy resources so that the amount of electricity generated from eligible renewable resources be an amount that equals an average of 20 percent of the total electricity sold to retail customers in California for compliance period 2011-2013; 25 percent of retail sales by December 31, 2016; and 33 percent of retail sales by December 31, 2020.<sup>3</sup> On October 7, 2015, SB 350<sup>4</sup> made further changes to Sections 399.11, et seq. including a requirement that the amount of electricity generated and sold to

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<sup>1</sup> SB 1078 (Sher, Chapter 516, Statutes of 2002); SB 107 (Simitian, Chapter 464, Statutes of 2006); SB 1036 (Perata, Chapter 685, Statutes of 2007); SB 2 (1X) (Simitian, Chapter 1, Statutes of 2011, First Extraordinary Session); SB 350 (de León, Chapter 547, Statutes of 2015).

<sup>2</sup> All further statutory references are to the Public Utilities Code unless otherwise specified.

<sup>3</sup> D.11-12-020 established a methodology to calculate procurement requirement quantities for the three different compliance periods covered in SB 2 (1X) (2011-2013, 2014-2016, and 2017-2020). Note it is 33% of a Load Serving Entity's annual retail sales for 2020 and each year thereafter.

<sup>4</sup> SB 350 (De León, Chapter 547, Statutes of 2015) effective on January 1, 2016.

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retail customers from eligible renewable energy resources be increased to 50% by December 31, 2030.<sup>5</sup>

One procurement program implemented by the Commission to support the RPS is the Renewable Market Adjusting Tariff (ReMAT) program.

Additional background information about the Commission's RPS Program, including links to relevant laws and Commission decisions, is available at [http://www.cpuc.ca.gov/RPS\\_Overview/](http://www.cpuc.ca.gov/RPS_Overview/) and [http://www.cpuc.ca.gov/RPS\\_Decisions\\_Proceedings/](http://www.cpuc.ca.gov/RPS_Decisions_Proceedings/).

### **Overview of the BioMAT Program**

SB 1122 (Rubio, 2012) added a requirement of 250 MW of RPS-eligible procurement from small-scale bioenergy projects that commence operation on or after June 1, 2013.<sup>6</sup> In D.14-12-081 and D.15-09-004, the Commission implemented SB 1122 by adopting the Bioenergy Market Adjusting Tariff (BioMAT) program. In D.16-10-025, the Commission implemented several changes to the BioMAT program in response to the tree mortality emergency identified in the Governor Edmund G. Brown's October 30, 2015 Proclamation of a State of Emergency and SB 840 (Trailer Bill, 2016).<sup>7</sup> Most recently in D.17-08-021, the Commission implemented changes to the effective capacity limitation of projects in the BioMAT program pursuant to Assembly Bill (AB) 1979 (Bigelow, 2016).<sup>8</sup> The Energy Division Director also issued a letter on November 28, 2017 sent to PG&E, SCE, and SDG&E temporarily capping the BioMAT offer price for BioMAT Category 3 (sustainable forest management) projects that do not commit

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<sup>5</sup> D.16-12-040 established additional procurement requirement quantities for the three compliance periods established by SB 350: 2021-2024, 2025-2027, 2028-2030.

<sup>6</sup> § 399.20

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

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to using at least 60% high hazard zone<sup>9</sup> (HHZ) fuel, and initiating an overall BioMAT program review pursuant to D.14-12-081.

## **DISCUSSION**

The Energy Division Director issued a letter on November 28, 2017 that was sent to the IOUs temporarily capping the BioMAT offer price for BioMAT Category 3 (sustainable forest management) projects, and initiated an overall BioMAT program review. More specifically, the Energy Division Director's letter capped the BioMAT Category 3 (sustainable forest management) offer price at the then current level of \$199.72/MWh unless a seller is committed to using at least 60% HHZ fuel. The temporary price cap was ordered to remain in effect during the BioMAT program review, which is currently ongoing.

### **BioMAT Program Review**

As Energy Division conducts the program review, it may propose changes to reform the BioMAT program. Until the Commission acts to enact program changes, the Commission-adopted program rules continue to govern BioMAT and the IOUs shall continue to hold new BioMAT program periods, accept new BioMAT applications, and execute new BioMAT contracts for eligible projects that accept a BioMAT price.

### **Pending BioMAT contracts**

In some of the more recent BioMAT program periods, several BioMAT program participants applied to the BioMAT program and accepted offered prices at \$127.72/MWh, \$187.72/MWh, and \$199.72/MWh, but contracts have not been executed. As noted above, the BioMAT program remains in effect and shall continue during its program review. Accordingly, the IOUs and BioMAT program participants that have already accepted a BioMAT contract price shall go forward with contract execution. The IOUs shall complete contract executions within 30 days of this Resolution and shall file a compliance filing with the

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<sup>9</sup> High hazard zones are designated by the California Department of Forestry and Fire Protection in accordance with the Governor's October 15, 2015 Emergency Proclamation.

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executed contracts by filing Tier 1 Advice Letter(s) within 45 days of this Resolution.

### **SAFETY**

Section 451 requires that every public utility maintain adequate, efficient, just, and reasonable service, instrumentalities, equipment and facilities to ensure the safety, health, and comfort of the public.

This Resolution requires the IOUs to execute contracts for eligible projects that have accepted a BioMAT offer price and continue running their BioMAT programs. Contracts using Commission approved standard contracts contain Commission approved safety provisions, which require the Seller to provide to the Buyer, prior to commencement of any construction activities on the Site, a report from an independent engineer (acceptable to both Buyer and Seller) certifying that the Seller has a written plan for the safe construction and operation of the facility in accordance with Prudent Electrical Practices. As a result, there are not any expected incremental safety implications associated with the execution of contracts approved by this Resolution.

BioMAT is one of several programs that support the Governor's Emergency Proclamation and SB 840<sup>10</sup> to address bark beetle and drought caused tree mortality and the hazards such tree mortality creates for the State of California. These hazards include, among other things, wildfires and tree falls that endanger thoroughfares, electric power lines, and public and private structures. Execution of contracts that meet the requirements of BioMAT Category 3 – sustainable forest management – that use HHZ fuels are intended to help address the hazards addressed in the Governor's Tree Mortality Emergency Order.

### **COMMENTS**

Public Utilities Code Section 311(g)(1) provides that this Resolution must be served on all parties and subject to at least 30 days public review and comment

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<sup>10</sup> § 399.20

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prior to a vote of the Commission. Section 311(g)(2) provides that this 30-day period may be reduced or waived upon the stipulation of all parties in the proceeding.

The 30-day comment period for the draft of this Resolution was neither waived nor reduced. Accordingly, the Draft Resolution was mailed to parties for comments on February 16, 2018.

The Commission received 15 comments. Several commenters—The Agricultural Energy Consumers Association (AECA), The Sierra Institute, Hat Creek Construction & Materials, Inc., Randy Fletcher—Yuba County District 5 Supervisor, The Watershed Training and Research Center, and Provost & Pritchard Consulting Group—support the Draft Resolution with no amendments. The U.S. Forest Service (USFS) wrote to inform the Commission that several projects participating in BioMAT Category 3 are grantees of the USFS, and that the USFS has awarded several more grants to projects due in large part to their future participation in the BioMAT program.

Other comments focused on particular aspects of the Draft Resolution, and they are discussed below.

### **Winding Creek Solar LLC v. Peevey**

Several parties express varying opinions about the impact of the District Court's order in *Winding Creek Solar LLC v. Peevey* on this Resolution and the BioMAT program generally.<sup>11</sup> Allco Renewable Energy Limited (Allco), a party to the Winding Creek case, argues that the Draft Resolution was directly contrary to the *Winding Creek* order. PG&E and SDG&E wrote that *Winding Creek* raises legal questions about BioMAT that should be addressed in the Resolution. SCE points out that *Winding Creek* could eventually have legal implications for the BioMAT program, but the order did not address BioMAT and so the Resolution does not contradict the order. The Bioenergy Association of California (BAC), Phoenix

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<sup>11</sup> Case No. 13-cv-04934-JD

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Energy, Aries Clean Energy, and AECA assert that the District Court's order does not apply to or affect BioMAT.

More specifically, SCE also highlights that "no enforcement petition concerning BioMAT has been brought to FERC [the Federal Energy Regulatory Commission], no petitioner yet has standing to challenge it in federal district court, and BioMAT was not before the *Winding Creek* court."<sup>12</sup> BAC adds in its comments that "the U.S. Supreme Court has held consistently that injunctive relief is an extraordinary and drastic measure that should be limited to the specific relief requested by the plaintiff and not applied more broadly."<sup>13</sup>

We agree that *Winding Creek* does not apply to the BioMAT program. The District Court's order granted some of the plaintiff's prayers for relief and determined that the Commission's ReMAT Orders (D.12-05-036, D.13-01-041 and D.13-15-034) violate the Supremacy Clause of the Constitution and enjoined the Commission from continuing to implement the ReMAT Program as set forth in those Orders. The operative complaint in *Winding Creek* does not, however, seek any relief regarding the BioMAT Program; BioMAT is not even mentioned. The lack of an enforcement action at FERC also raises a serious standing issue. BAC, moreover, is correct that the *Winding Creek* order "should be limited to the specific relief requested ... and not applied more broadly."<sup>14</sup> Interpreting the District Court's order to apply to BioMAT would go beyond that order, would go beyond addressing the *Winding Creek*'s operative complaint, and would inappropriately expand the scope of the order beyond what was issued by the Court.

We therefore order that the IOUs continue to hold new BioMAT program periods, accept new BioMAT applications, and execute BioMAT contracts for projects that accept a BioMAT price, consistent with existing Commission orders and the Energy Director's November 28, 2017 letter. We also order the IOUs to

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<sup>12</sup> SCE Comments at 3.

<sup>13</sup> BAC Comments at 2.

<sup>14</sup> *Ibid.*

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execute contracts with the developers that have already accepted a BioMAT offered price.

We also deny PG&E's suggestion to modify the form BioMAT contract or approve a related agreement granting them additional legal protections in the event that BioMAT be found by a court to be illegal.

### **Deadline to Execute Pending PPAs**

PG&E and SCE request that they be given 60 days to execute affected PPAs, rather than the 30 days in the Draft Resolution. PG&E asserts that they need 60 days to "ensure that they have ample time to work with counterparties to ensure that the contracts reflect the current details and status of each project."<sup>15</sup>

PG&E indicates that it has a total of eleven PPAs from three separate BioMAT Program Periods to prepare for execution. PG&E argues that "preparation for execution includes working closely with the counterparty to update project information that may have changed since the original application submittal date, which takes time to finalize."<sup>16</sup> While it is reasonable that it will take time and resources for the IOUs to prepare BioMAT contracts for execution, BioMAT contracts are standard contracts, meaning there is nothing left to negotiate between Sellers and the IOUs after price acceptance takes place. Further, we expect that the IOUs have already done some of the work to update project information for those projects that accepted a PPA. For example, Phoenix Energy writes that "PGE has stated that they need nothing further from the projects only guidance from the CPUC."<sup>17</sup> Therefore, we deny PG&E's and SCE's request for a modification to extend the deadline.

Phoenix Energy requests that the Resolution be amended to require the IOUs to execute contracts with the developers that have already accepted a BioMAT offered price within five days of this Resolution. As noted above, it is reasonable that it could take time to finalize contracts, thus we deny this request. However,

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<sup>15</sup> PG&E Comments at 3.

<sup>16</sup> Ibid.

<sup>17</sup> Phoenix Energy at 5.



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we recommend for the IOUs to not delay and to execute contracts earlier than the deadline set by this Resolution if they are indeed awaiting nothing further from those projects other than guidance from the Commission.

SCE also requests that the deadline for executing contracts should be amended to a deadline to “prepare contracts for execution with BioMAT program participants.”<sup>18</sup> We deny this request because the Commission regulates contract execution—not contract preparation. This Resolution orders the IOUs to execute numerous PPAs. Simply ordering that contracts be prepared for execution does not ensure that they will be executed, and it is unclear how the IOUs would make such a showing or how the Commission would verify that such a requirement has been carried out.

**Executing Future PPAs**

Ordering Paragraph 1 of the Draft Resolution orders the IOUs continue to hold new BioMAT program periods, accept new BioMAT applications, and execute BioMAT contracts for projects that accept a BioMAT price, consistent with existing Commission orders.

SCE requests that we strike the requirement that IOUs execute future contracts for projects that accept a BioMAT price, and instead require that IOUs “prepare executable contracts for BioMAT program participants that remain eligible for the BioMAT program and that have accepted a BioMAT contract price, offer such executable contracts to eligible BioMAT program participants, and if such eligible BioMAT program participants execute the contract offered, the IOUs shall proceed with contract execution.”<sup>19</sup> SCE does not explain why it is seeking this change. We will partially accept SCE's suggestion, though to clarify that the IOUs shall execute contracts with *eligible* projects. The IOUs should not enter into BioMAT contracts with projects that do not meet BioMAT's eligibility requirements.

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<sup>18</sup> SCE comments at 6.

<sup>19</sup> *Ibid.*

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BAC also requests that Ordering Paragraph 1 be amended. Specifically, BAC requests that it be amended to "require that utilities comply with direction from CPUC staff as well as Commission Orders."<sup>20</sup> Such a modification is not necessary because when staff gives direction to regulated entities, they are acting on the authority of the Commission; thus, we deny BAC's request.

### **Tier 1 Advice Letter**

SCE requests that we eliminate Ordering Paragraph 3 requiring that the IOUs file the executed BioMAT contracts via a Tier 1 advice letter. They explain that the contracts "are based on standard, tariffed terms approved by the Commission and as such, the contract terms do not vary and the tariffs do not require BioMAT contracts to be filed with the Commission."<sup>21</sup> Instead, they suggest that Energy Division can request copies of the executed contracts from the IOUs should it wish to see them.

We agree with SCE that standard, non-modifiable contracts have not previously been required to be filed with the Commission through the advice letter process. However, this circumstance is a specific ordering of the execution of a particular set of PPAs. Thus, the required compliance showing of contract execution is reasonable. Asking Energy Division to request copies at a later date is an unnecessary step that can be avoided by requiring Tier 1 advice letters. Therefore, we deny SCE's request to eliminate the Tier 1 advice letter requirement.

### **Additional Issues Raised**

ORA requested clarification that any program changes that may be proposed as part of Energy Division's program review are not being made through this Resolution.

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<sup>20</sup> BAC Comments at 4.

<sup>21</sup> SCE Comments at 2.

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The purpose of this Resolution is to ensure that Commission Orders D.14-12-081, D.15-09-004, D.16-10-025, and D.17-08-021 are carried out by ordering the continuation of the BioMAT program and the execution of contracts with eligible program participants according to current program rules.

As such, we are rejecting requests that fall outside the scope of this Resolution that pertain to broader changes to the BioMAT program that are better addressed through a Commission Decision. As noted in the November 28, 2017 letter from Energy Division Director Edward Randolph, a BioMAT program review is being undertaken and any proposed changes to reform the BioMAT program will stem from Energy Division's program review. Thus, we are rejecting PG&E's request that costs be allocated to all load-serving entities, Allco's requests to eliminate certain ReMAT and BioMAT rules and revert back to the starting prices for each program, BAC's and Phoenix Energy's request to subject IOUs to penalties, and BAC's and Aries Clean Energy's request that Ordering Paragraph 1 be amended to require that the IOUs execute all future contracts within 30 days of receiving all necessary information from project developers.

Lastly, we also deny BAC's request to reiterate the Administrative Law Judge's (ALJ) Order of December 18, 2017 stating that the utilities may not suspend any part of BioMAT procurement without the Commission's prior approval. The ALJ's previous ruling stands and does not need to be reiterated here.

**FINDINGS**

1. Several program participants successfully applied to the BioMAT program and accepted offered prices, but the BioMAT contracts have not yet been executed by the IOUs and participants.
2. The BioMAT program review initiated along with a temporary price cap by the Commission's Energy Division Director in a letter sent to PG&E, SCE, and SDG&E on November 28, 2017 is ongoing.
3. The plaintiff's operative complaint in the *Winding Creek* lawsuit does not seek and the District Court does not order anything related to the BioMAT program.

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4. The Commission will consider Energy Division staff's recommendations for BioMAT program changes when a proposal becomes available. Current program rules should continue to govern BioMAT until the Commission acts to enact program changes.

**THEREFORE IT IS ORDERED THAT:**

1. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company shall continue to hold new BioMAT program periods, shall accept new BioMAT applications, and shall execute BioMAT contracts for eligible projects that accept a BioMAT price, consistent with existing Commission orders regarding the BioMAT program.
2. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company shall within 30 days of this Resolution execute contracts with the developers that have already accepted a BioMAT offered price.
3. Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company shall within 45 days of this Resolution file Tier 1 Advice Letter compliance filings with the contracts ordered in Ordering Paragraph 2.

This Resolution is effective today.

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I certify that the foregoing Resolution was duly introduced, passed and adopted at a conference of the Public Utilities Commission of the State of California held on March 22, 2018; the following Commissioners voting favorably thereon:

/s/ ALICE STEBBINS

ALICE STEBBINS

Executive Director

MICHAEL PICKER

President

CARLA J. PETERMAN

LIANE M. RANDOLPH

MARTHA GUZMAN ACEVES

CLIFFORD RECHTSCHAFFEN

Commissioners